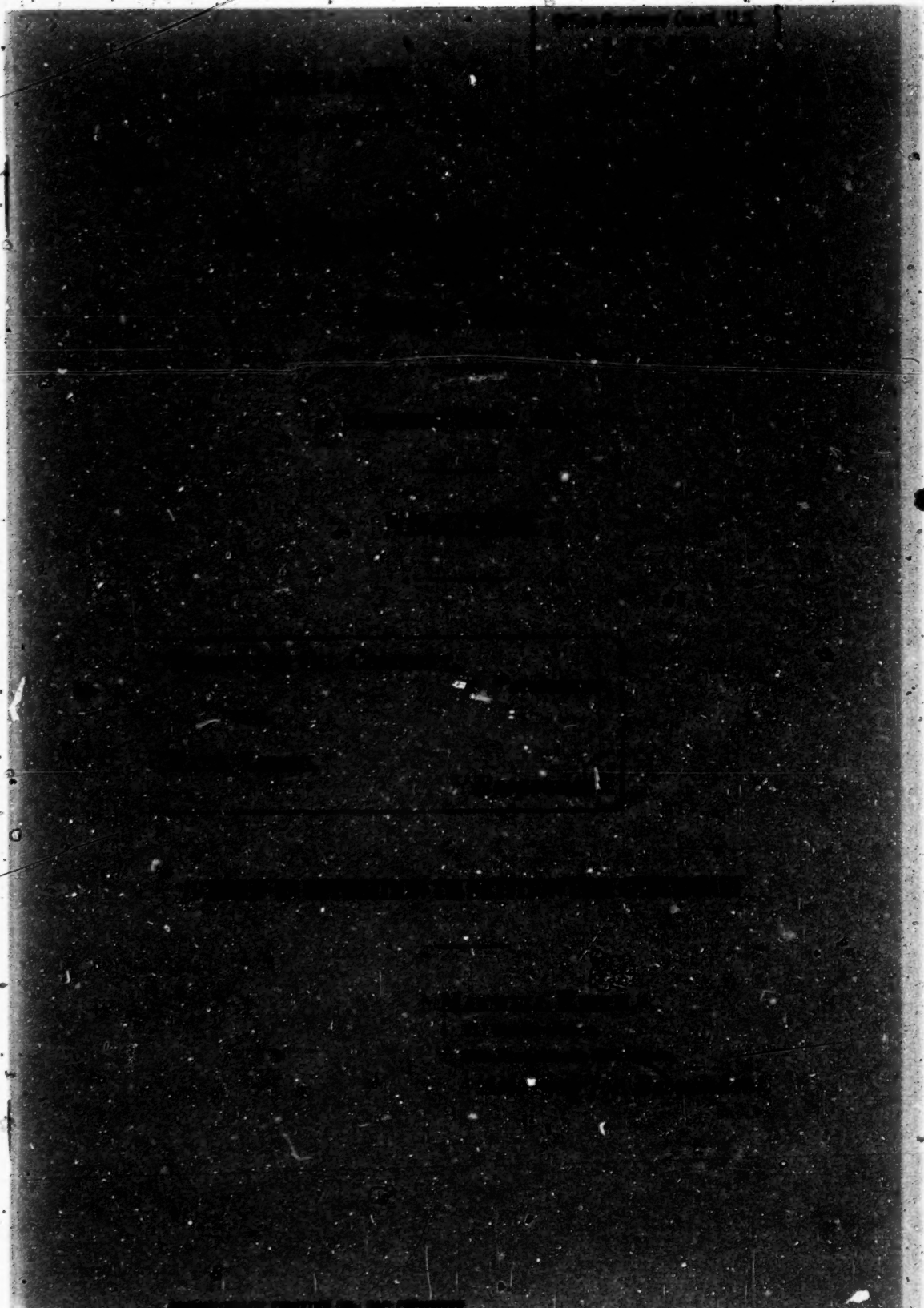

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 1095

TIDEWATER OIL COMPANY, *Petitioner,*

vs.

PAUL LESSIG, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

A. Nature of the Case

Respondent claimed that the defendant-appellee was in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C.A. § 14. Respondent, a service station operator (R. 595),[1] sought treble damages under Sec-

[1]Respondent will refer to the Clerk's record as Tr. and the record of the trial proceedings as R.

tion 4 of the Clayton Act, 15 U.S.C.A. § 15, by reason of the cancellation of the service station lease (Pl's Ex. 5) and dealer contract (Pl's Ex. 6) between the respondent and petitioner dated November 15, 1955, as to Tidewater service station site No. 62 located at 22nd and Irving Street, San Francisco, California. It was charged that said cancellation was made pursuant to an alleged unlawful plan of Tidewater Oil Company to fix and control retail prices of independent dealers who purchase gasolines from Tidewater for resale. Respondent's contracts with Tidewater were terminated immediately following an order by Tidewater's San Francisco District Marketing Manager, Mr. C. R. Clark, for Mr. Lessig to lower his price to that of Standard Oil station at Nineteenth and Irving, San Francisco (R. 687; Pl's Ex. 84).

Respondent also sought damages arising from his inability to sell gasoline at market prices of his own judgment during the period 1955 to 1958 as a result of Tidewater's unlawful control of his prices (Tr. 8, 10).

Respondent also claimed damages suffered by reason of Tidewater's policy of requiring its service station lessees to purchase gasolines, oils, tires, batteries, and automotive accessories sold, authorized or sponsored by Tidewater Oil Company as a condition to lease occupancy (Complaint, para. 27, Tr. 10). Respondent was required to buy such products from Tidewater by direct order from Tidewater and under fear of lease cancellation (R. 606, 654-658, 677, 800).

B. The Complaint

The complaint charges, inter alia, that the Tidewater Oil Company has unreasonably restrained interstate trade and commerce and attempted to monopolize such commerce in the following:

(a) Creating and entering into leases and contracts, and the forcing of oral exclusive dealing agreements, with thousands of otherwise independent service station operators which require that independent service station operators secure their entire requirements, both as to petroleum products and tires, batteries and other automotive accessories exclusively from the defendant or its designated agent, and which provide that the defendant shall directly control the retail prices charged by the independent operators to the public for gasoline (Complaint, para. 14, Tr. 4-5).

(b) Price fixing and exclusive dealing contracts and agreements are forced upon the service station operators against their desires and are enforced by employees or agents of the said defendant who constantly watch the pricing policies of these independent service station operators, and the petroleum products which are sold by them (Complaint, para. 15, Tr. 5).

(c) The service station dealer is required to sign a form lease which provides for leasing of the property year to year, cancellable at any six months' period on 30 days' notice (Tr. 5).

(d) In addition to signing the said lease, the dealer is required to sign a dealer contract which requires the lessee dealer to purchase all of his petro-

leum products from the defendant by providing that he shall buy a given volume of gasoline and motor oils from the defendant, said volume being the expected average capacity of said service station (Complaint, para. 16, Tr. 5).

(e) The service station operator knows that his lease will not be renewed at the end of the one-year period should he refuse to follow the dictated prices or exclusive dealing arrangements of the defendant (Complaint, para. 18, Tr. 6).

The complaint alleges further that the defendant, by the aforesaid conduct, virtually controls all the profits to be made in the retailing of gasoline at the expense of the independent dealers and prevents them from selecting successors or obtaining good will values (Id., para. 19, Tr. 6-7).

The plaintiff alleged that he was connected with the retailing of gasoline since 1945; that he assumed a prior lease of the defendant's service station site at 22nd and Irving Street, San Francisco, California, and on November 15, 1955, he entered into a lease for the operation of said station with defendant. At the time of the entry into said lease it was contemplated that the defendant would refurbish said service station and modernize the premises. Plaintiff was required to sign a dealer contract under which he was to obtain his petroleum products from the defendant (Id., para. 21, Tr. 8).

The tankwagon or wholesale price of gasoline charged to plaintiff was continuously raised by the defendant and the plaintiff was told by the employees

or agents of defendant to raise his retail prices (Id., para. 22). It was further alleged that the plaintiff was told at the time he entered the service station site that he was expected to obtain his tires, batteries, and automotive accessory products from the retail representative of the defendant or by the defendant's warehouse by calling the said warehouse by phone for his orders.

The defendant made it understood that plaintiff was expected to acquire his automotive accessories only from the defendant and no one else. Following said statements by an agent of defendant, the service station of plaintiff was continuously policed by defendant to be sure that plaintiff was selling only authorized or sponsored tires, batteries, and other automotive accessories (Complaint, para. 23, Tr. 9).

Plaintiff next alleged that on April 8, 1958, a Mr. C. R. Clark, the District Marketing Manager of the defendant, called upon plaintiff and told him that he was selling prices higher than he should and demanded that plaintiff sell his gasoline lower than what he had set on his pumps. It is alleged that the plaintiff refused to abide by the demands of Mr. Clark and persisted in setting his own price for gasoline, and that as a direct result of persisting in setting his own prices for gasoline and in not being bullied by Mr. Clark, plaintiff received a notice dated April 11, 1958 from defendant that his lease would be canceled as of May 11, 1958. Said lease was canceled on said date, and plaintiff was forced to surrender the premises to the defendant. It is alleged that the only reason

known to the plaintiff for the cancellation of his service station lease with the defendant was his refusal to abide by the dictates and demands of the defendant as set forth (Complaint, para. 23, Tr. 10).

Plaintiff prayed for damages, as follows:

(a) He was unable to fix and establish his own retail price for the sale of gasoline to his injury and damage in the sum of $7,000.00.

(b) He was unable to purchase and sell for resale the automotive accessories distributed by others to his injury and damage in the sum of $6,000.00.

(c) He was unable to retain possession of the premises at 22nd and Irving Street, San Francisco, California, for the full term of his dealer agreement to his injury and damage in the sum of $27,500.00.

(d) He was unable to realize the good will of the business he developed while operating said service station during which time he increased the gallonage of said station from approximately 9,000 gallons per month to approximately 15,000 gallons per month, to his injury and damage in the sum of $25,000.00.

(e) He was forced to accept the following losses to his business to his injury and damage:

(i) He became unable to collect approximately $500.00 on accounts receivable by reason of his being unable to be in constant contact with his credit customers.

(ii) He was forced to pay $35.00 in escrow fees on the sale of his merchandise to his successor chosen by defendant.

(iii) He was forced to expend approximately $450.00 in advertising costs in connection with advertising the modernization of said service station, which defendant has refused to refund to plaintiff (Complaint, para. 27, Tr. 10-11).

The complaint of the plaintiff was in two counts. In the second claim for relief, plaintiff alleged a conspiracy with other major petroleum companies to fix prices and monopolize the production, transportation, refining and marketing of crude oil and refined products in the Pacific States area in violation of Section 1 and 2 of the Sherman Act. The second claim alleged the institution of a government proceeding as to which the second count was based in whole or in part (Complaint, Tr. 12, 19-20).

A motion to strike the complaint was denied by the court (Tr. 21-23) and the defendant answered the complaint (Answer to Complaint, R. 24-34). After the filing of the Answer pre-trial conferences were held in which the parties set forth their statement of the issues. The plaintiff's Statement of Issues appears at Tr. 44-45 and the defendant's Statement appears at R. 39-41. In addition to filing a statement of issues the plaintiff also filed a pre-trial statement of contentions (R. 55-59). Following the pre-trial conference of June 2, 1961, the court entered a pre-trial order in which the second claim for relief alleged in the plaintiff's complaint for damages was dismissed; the defendant's motion to dismiss the first claim in the plaintiff's claim was denied and a further pre-trial conference was set (R. 69).

C. The Parties

Respondent-plaintiff became a service station lessee of the defendant Tidewater Oil Company when he entered into a service station lease with the defendant on May 31, 1955 (Tr. 27) and a "Dealer Contract" with Tidewater Oil Company concerning the purchase of gasoline and motor oils and greases (Tr. 27). A new lease and Dealer Contract was signed on November 15, 1955 (Tr. 27).

The terms of the lease provided that the lease would be for a period of one year, and from year to year thereafter, subject to termination at the end of the first or any subsequent six months' period by either party upon thirty days' written notice (Pl's Ex. 5, para. 2).

The lease provides that the lessee shall (a) pay a stipulated amount as rent plus one cent a gallon of gasoline purchased (Pl's. Ex. 5, para. 3); (b) not be considered an employee or agent of Tidewater (Id., para. 5); (c) hold Tidewater harmless from any and all liabilities, costs or expense of personal or property damage (Id., para. 4(b)); and (d) pay all taxes, license fees, and other charges, and pay for water, electricity and operating expenses (Id., para. 4(c)).

Plaintiff was instructed to keep his station open from 7:00 a.m. to 10:00 p.m. every day of the week (R. 610-611).

In order to enter into the service lease plaintiff spent $419.68 for equipment and inventory (R. 605).

The Dealer Contract provided for the sale to plaintiff of Tidewater gasoline and motor oils of a specified

yearly gallonage, estimated on the expected requirements of the dealer (Pl's Ex. 6, R. 147-150).

Petitioner-Defendant Tidewater Oil Company is a major oil company doing business in thirty-two states in the United States and has assets in excess of $800,000,000 (Pl's Ex. 15). It does approximately 6½ per cent of the petroleum business in the Western States, and is ranked within the first twenty oil companies nationally (R. 286).

Tidewater operates four retail service stations in California, one retail service station in Oregon and one retail service station in Washington (Tr. 26).

Tidewater Oil Company acquires possessory interests in service station sites in the States of California, Oregon, Washington, Nevada and Arizona and leases said sites to others. It admits that most of the said service station sites are leased or sub-leased by it to independent operators (Answer to Complaint, para. 10, Tr. 26). As of December 31, 1956, Tidewater Oil Company had Dealer Agreements with 2,765 service station operators in the States of California, Oregon, Washington, Idaho, Nevada, Arizona, Utah and the Hawaiian Islands (Pl's Ex. 113).

Tidewater Oil Company classifies its dealers into the following categories: "A" sublessees, "B" sublessees, and Dealer Contracts and open accounts (Id.).

An "A" sublessee is the lessee of one of the company-owned properties, either owned in fee or held under a long term lease (R. 140). Plaintiff would be classified as an "A" lessee (Id.).

"B" lessee operators are operators who have a possessory interest in the premises; generally these operators lease the property from others, sublease it to Tidewater, who subleases it back to the dealer (R. 145-147).

D. Statement of Facts

1. The Cancellation of Leases to Support Price Orders

Respondent was an errant lessee. In 1956 Mr. Lessig was told to drop his price by the Tidewater representative. Mr. Lessig refused (R. 682-683). This happened five or six times, (R. 683). By April, 1957, the defendant's report on Mr. Lessig was, (Pl's Ex. 87):

> ". . . During the most recent price war, it was difficult to get him to lower his prices to meet competition in the area even though he was receiving assistance. This was a factor in losing some gallonage. Mr. Lessig is quite active in the Irving Merchants Association and in the San Francisco Dealers Organization."

In July or August, 1957, Mr. Lessig refused to place a price sign up after being requested by Tidewater representatives who came to the station with a price sign for posting. (R. 683-684). In September, 1957, a Tidewater representative at the station told Mr. Lessig he should pass on his "subsidy" to the customers. (R. 685). In March, 1958, Mr. Lessig refused to drop his prices after being told: "I would have to drop my price to compete with my competition." (R. 681). Then on April 18, 1958, he refused to be bullied by the District Marketing Manager himself. At this time the following occurred (R. 686):

"Q. Can you recall anything further with respect to that conversation?

A. Not that I can recall.

Q. Mr. Lessig, can you state whether or not you had a conversation with respect to prices with Mr. C. R. Clark?

A. Yes, sir.

Q. Who was C. R. Clark?

A. He was the district manager of Tidewater Oil Company.

Q. Approximately when did that conversation take place?

A. April 6, 1958.

Q. Can you tell us what was said and done in that conversation, Mr. Lessig?

A. It was about two o'clock in the afternoon and a car drove in and I went over to wait on them and the driver of the car introduced himself as Mr. Hefner.

Q. Did you know who Mr. Hefner was at that time?

A. No, sir.

Q. Did he tell you?

A. Yes, sir.

Q. What did he say?

A. He said, 'I guess you know Mr. Clark.'

Q. Was Mr. Clark in the automobile at that time?

A. Yes, sir.

Q. Then what occurred?

A. Mr. Clark got out of the car and said, 'What the hell's the matter with your prices out here?'

Q. What did you say, sir?

A. I said, 'There's nothing wrong with our prices. We are posted the same as everyone else is on Irving Street.'

Q. What did Mr. Clark say?

A. He says, 'The Hell you are. Standard up at Nineteenth and Irving is posted two cents below you.'

Q. Standard Oil, Inc., station, sir?

A. Yes, sir.

Q. Two cents below you, sir?

A. Yes, sir.

Q. Could you tell us everything you can remember now about that conversation, Mr. Lessig?

A. As near as I can recall, Mr. Clark was very abusive in his tone——

Q. Now, just tell us what you said, sir. What you said to Mr. Clark and what Mr. Clark said to you.

A. He asked me how I expected to sell gasoline at such a high price?

Q. Did you say anything, sir?

A. I told him that our gallonage had not dropped.

Q. Now, about how long was Mr. Clark at the station, sir?

A. I would judge about fifteen minutes."

Following this conversation on April 11, 1958, Mr. C. R. Clark addressed a letter to Mr. Lessig in which he stated that it was the desire of Tidewater Oil Company to terminate all agreements between the parties effective thirty days from and after receipt of the notice (Pl's Ex. No. 84). No reasons were given in the letter for the termination. The plaintiff-appellant was required to leave the station despite his constant efforts to remain on the premises (R. 697-700). The respondent was required to leave the premises despite

the fact that defendant was put on notice that its insistence upon cancelling the agreements between it and the plaintiff would be alleged to be based upon violation of the anti-trust laws (Pl's Ex. 114).

The respondent's testimony as to the conversation with Mr. Clark was undisputed.

Mr. Lessig insisted on setting his own prices following the conversation with Mr. Clark on April 8, 1958 (Pl's Ex. 83). Plaintiff kept his price at 33.9¢ from April 8, 1958, to May 11, 1958. (Id.)

Mr. Mel Cristoni operated service station No. 37 of Tidewater Oil Company at 45th Avenue and Judah Street, San Francisco, during the period 1946-1960. Mr. Cristoni testified on direct examination he followed price directions and believed his lease would be terminated unless he did follow such directives (R 76).

Mr. John Ely, an operator at the petitioner's station No. 105 at 525-98th Avenue, Oakland, California, during the period 1953 to 1961 testified that he had to comply with price orders, "or else" (R. 473-475).

Furthermore, the very next successor of Mr. Lessig to the station at 22nd and Irving Street, San Francisco, California, Mr. David L. Wells, testified that his prices were being controlled by Tidewater. The Tidewater representative changed Mr. Wells' pump prices (Tr. 424-431).

2. **Tidewater's Dealer-Aid Program**

The evidence thus was that the petitioner controlled independent reseller prices by a plan and program in-

tended to accomplish such price control. Such program involved the following: (1) A high tank wagon price to the dealer (Pl's Ex. 35, Answer, para. 12, Tr. 27) and (2) a dealer aid or assistance program which allowed petitioner to control retail prices by conditioning rebates to the dealer based on the dealer's agreement to charge the retail prices desired by Tidewater. When prices were to go up, dealer aid was withdrawn. When prices were to go down, the dealers were informed the price to be charged and the dealer aid available (Pl's Ex. 40, 36 and 37). (3) As heretofore seen, the cancellation of leases and dealer agreements as to errant dealers.

Prior to July 16, 1956, the dealer would receive a credit at the end of the month for his dealer assistance. In July, 1956, however, Tidewater required the dealers to fill out a statement of sales volume as a basis for credit to be allowed (Pl's Ex. No. 40, Letter 7/16/56).

On October 4, 1957, a new program was devised by Tidewater Oil Company by which the dealer assistance would be based upon a price schedule which would require the dealer to absorb a certain portion of the so-called dealer assistance (Pl's Ex. 36). Tidewater devised a system whereby a "normal" price was established which was posted tank wagon price plus 5½c margin. The Dealer-Aid schedule would take effect when the retail selling price had dropped below this figure. A retail price of $.035 above the current truck delivered price, required the dealer to absorb

25% of the price drop. There was to be no change, however, in the policy of dealers or two-party B leases receiving an additional special allowance or rentals (Pl's Ex. 36, R. 168-177).

When the Tidewater Oil Company determined that the prices should be normal, dealer assistance would be cancelled by Tidewater regardless of requests of the dealer. Mr. Brunn, the Western Division Manager of Tidewater Oil Company, testified that dealer assistance would be refused by Tidewater regardless of the fact that so-called off-brand stations in the area would be charging a price below the Tidewater dealer prices (R. 189-190). Determination of when prices were to be normal was solely the determination of Tidewater Oil Company (R. 201).

On January 7, 1958, Tidewater Oil Company adopted a new procedure whereby dealer aid would be extended on purchases from the company rather than on sales made by the dealer. Effective on February 1, 1958, the dealer was to sign a new form called No. 6-1 (Pl's Ex. 77, in part R. 201-202). Under this new form the dealer signed a retail price form prepared by Tidewater Oil Company representatives (R. 66-67, 203-204). The Tidewater representative determined the competitive prices, filled in the retail price that the dealer was to charge in order to receive dealer assistance, and brought the form to the dealer when the Tidewater Oil Company desired a price change. (Mr. Marshall Pease, the District Manager of the San Francisco District at R. 556-558.)

The record showed, however, that dealers would often request dealer aid, but be refused it by Tidewater (R. 44-52; 66-70; R. 479-487). On the other hand, dealers were often told they should reduce their retail prices despite their protests (R. 473-475).

Tidewater representatives would physically change pump prices (R. 121-125; 426-431). Tidewater representatives would supply the dealers with price signs and price numbers identical to the retail prices directed or set by Tidewater (R. 56-58; 124-125; 496; 429-430; 560).

3. **Tidewater's T.B.A. Plans and Programs**

The evidence was undisputed that:

(a) Tidewater told the dealer upon obtaining a lease that he was to obtain his automotive accessories from the Tidewater warehouse; (b) that Tidewater would dump large quantities of merchandise at the dealer's station without request; (c) that Tidewater would call upon the dealer and order him to dispose of non-sponsored merchandise; (d) that Tidewater representatives would inspect the back rooms and warehouse facilities of the dealer to make certain that he was not storing non-sponsored articles; (e) that on checkout the Tidewater representative would not attempt to sell non-sponsored articles to the incoming dealer and; (f) Tidewater would often arrange for a representative of a manufacturer of sponsored TBA to appear at the service station premises of a dealer together with a Tidewater representative in order to get an order for the merchandise.

The dealers testified that they were told to buy their automotive accessory products from Tidewater Oil Company (R. 42-43; 118; 407; 425; 469-471).

Mr. Lessig, the respondent, was told that he would have to buy all of his oil products from the Tidewater Oil Company (R. 605-606). The evidence was uncontradicted that the Tidewater representatives would check the back rooms of the dealers and inspect their premises for unauthorized TBA (Cristoni, R. 39; Mr. Fox, R. 119, 128; Mr. Wells, R. 426; Mr. Ely, R. 427). Mr. Lessig's nephew, Mr. Paul Lessig, testified that respondent's personal financial records were inspected without consent (R. 403, et seq.).

Respondent's first witness, Mr. Berry Hurley, owner of the independent supply company; Irving Auto Supply, testified that he was called by a Tidewater representative on the telephone and told to take Ampking batteries out of the Flying A Station operated by Mr. Cristoni (R. 6-8). Mr. Cristoni corroborated the conversation (R. 36-39). The Tidewater representative, Mr. Finn, went around to the back room, saw the Ampking batteries, told Mr. Cristoni he should have known better, that he shouldn't have anything but Flying A's and he went to the telephone and called the Irving Auto Supply and told them to come down and pick up the batteries.

At the service station site involved herein, in 1961, at 22nd and Irving Street, San Francisco, California, the Tidewater Oil Company's representative required the dealer, Mr. Anderson, to return brake shoes to the independent Irving Auto Supply because they were

not purchased through Tidewater (R. 8-16; R. 23-25; R. 27-28).

Mr. Alan Squires, salesman for the Pennzoil Company, testified that he never had seen Pennzoil openly displayed in a Tidewater station during the period 1955 to 1958 in the San Francisco territory, consisting of three-quarters of San Francisco and all of Marin County (R. 95). Approximately one out of three Tidewater dealers told him that they could not handle Pennzoil because of Tidewater policies (R. 101). He recollected a few conversations with respect to the reason why Tidewater dealers would not buy the Pennzoil. A Mr. Polizi told him that he was told that a Tidewater representative had complained about his buying the Pennzoil from Mr. Squires (R. 97-98). A Mr. Sheideck told him that he wasn't allowed to handle Pennzoil (R. 99-100).

Mr. Squires never saw Pennzoil openly displayed at Mr. Lessig's service station (R. 101).

The evidence was also uncontradicted and undisputed that the Tidewater Oil Company would dump expensive Flying "A" tires on service station premises even though unordered. Mr. Lessig remembered the specific date May 2, 1957, by reference to the invoice from Tidewater (Pl's Ex. 21). He was told by a Mr. Finn, the Tidewater representative, that he would have to buy $400 worth of tires from Tidewater (R. 655-656). The testimony, in part, appears as follows, at R. 656:

"Q. What did you say?

A. I told him I didn't want the tires.

Q. Anything else said and done in that conversation?

A. He says, 'It doesn't make any difference. You are going to have to buy $40000 worth of tires.'

Q. Did you say anything to that, sir?

A. I said, 'I might have to, but I don't want to.'

Q. Then what occurred, sir?

A. Two days later, I think, the tires came out."

This dumping of tires was shown to be directly tied to the Western Division's tire-selling program (Pl's Exs. 47 and 48).

It was the policy of Tidewater to inform an incoming dealer that he would only have to buy inventory sponsored by Tidewater from the outgoing dealer (R. 675). The Tidewater Oil representative was shown to act as the person who arranges the inventory sale and purchase between the incoming and outgoing dealer and is thus in the critical position of being able to list or not list products that can be sold to the incoming dealer (R. 675-677). The Tidewater Oil Company insisted that the dealer buy TBA inventory. In the case of Mr. Fox, he was told that he would have to buy $5,000 worth of inventory and equipment (R. 130).

It was undisputed that the policy of Tidewater Oil Company required the dealers to put only authorized or sponsored automotive accessories on credit card purchases, on pain of refunding to Tidewater the purchase price for violation (Pl's Ex. 56; R. 311-314).

Each sponsored product of Tidewater received a code number, and reports are made to the manufacturer in many cases, called rebate reports (Pl's Exs. 55 (R. 309), 41, 42, 49, 50, 51).

The automotive accessory sales of the dealer are accumulated by the Tidewater company and, of course, become the basis for constant evaluation (Pl's Exs. 54, 58, 70). Tidewater Oil Company salesmen are instructed as follows:

> "Your reputation with the company is dependent upon the amount of company products (petroleum and TBA) that are sold through your station." (Pl's Ex. 57; R. 315).

The record further was undisputed that Tidewater required, by written agreement, that the dealer obtain his petroleum and oil requirements from Tidewater Oil Company. Such exclusive dealing contracts were signed at the time the lease was signed.

As has heretofore been seen, the dealer contracts of Tidewater Oil Company (Pl's Ex. 6) contain an express statement that seller shall sell and deliver to dealer and dealer shall purchase a certain yearly total requirement of gasoline and crude oil (Pl's Ex. 6). The gallonage figures to be purchased by the dealer represent what would normally be the requirements of the dealer. Mr. Walter Brimm, the Western Division Manager of Tidewater Oil Company so testified (R. 149-150).

4. The Evidence as to Injury and Damages.

Mr. Lessig's testimony beginning at R. 595 shows that it was Tidewater who originally contacted him and asked if he would be interested in the station at 22nd and Irving (R. 597-598). The service station was in a run-down condition, and the inventory and equipment of the prior dealer cost Mr. Lessig $419.68 (R. 605). Mr. Lessig was told that he would have to have trading stamps (R. 613), that he would have to buy all of his TBA's and gasoline and oil from Tidewater Oil Company (R. 605-606).

Starting on August 14, 1955, the service station site was remodeled and the service station site was put out of operation. Mr. Lessig had no rest room facilities, no wash rack facilities and the ground was torn up. This occurred for about three weeks in September, 1955 (R. 618-619). A grand reopening was scheduled for December 2, 1955, for which Mr. Lessig was to pay one-half of the expense and Tidewater would pay one-half, not to exceed $150.00 (R. 619-622). Mr. Lessig paid $469.00 for the grand opening expenses and requested a credit from Tidewater based on the fact that it had sent out the grand opening announcements after the grand opening day by Tidewater (R. 622-625).

As heretofore seen, the original lease and dealer contract between the parties was dated May 1955 and was superseded by agreements dated November 15, 1955 (Pl's Ex. 6). The said subsequent agreement called for an increase in the payment of rent by Lessig.

During the period 1956-1958, Mr. Lessig purchased $103,925.00 worth of gasoline and 5,416 gallons of oils and $6,566.00 worth of tires, batteries and accessories (Pl's Ex. 95; R. 721).

Mr. Lessig's retail prices fluctuated up and down in an inconsistent manner as compared to the increasing tank wagon prices to Mr. Lessig during the period 1955-1958 (Pl's Ex. 83). For these price drops Mr. Lessig was given dealer aid allowances (Pl's Ex. 77). No dealer aid was given during the period April 1958 to June of 1958 (Id.).

The 6-1 form presented to plaintiff was pre-prepared by a Tidewater representative (R. 680), and plaintiff was presented with price numbers or numerals at the same time as the form was presented to him (R. 682). Mr. Lessig testified that he was told when to drop prices and that it was his policy to establish his own prices (R. 680-685).

The record is undisputed that Mr. Lessig made every effort to keep his service station following the conversation with Mr. Clark on April 8, 1958 (R. 685-701). Mr. Lessig's pleas were unavailing and he left the station after protest on May 15, 1958 (R. 701).

As to the TBA's, the record is undisputed that the effect of Tidewater's program on Mr. Lessig (R. 605-606, 653-655) was as follows: Mr. Lessig purchased only one new tire that was not manufactured as a Flying A brand tire (R. 702), and would purchase only recaps (R. 722). He would not buy other brands of tires, even though the Flying A margin was exceedingly small and, by the time the new tires were

mounted very little profit was made (R. 725). When asked why he would buy Flying A tires when he could buy them cheaper elsewhere, Mr. Lessig testified as follows at R. 800:

"A. I was afraid to put them in my stock in my station.

Q. Can you tell us why you were afraid, sir?

A. Well, because I was told to buy my tires from Tidewater Oil Company.

Q. By whom?

A. By Mr. Finn.

Q. A representative of Tidewater Oil Company?

A. Yes, sir."

Mr. Lessig testified that he could obtain most of the automotive accessories authorized and sponsored by Tidewater cheaper elsewhere and he listed the following possible savings:

Tires: He could save 10%-15% on tires (R. 725).

Batteries: He could buy them $4-$5 cheaper (R. 726).

Auto lamps: He could buy them 20-40 cents a box cheaper (R. 728).

Others: He testified that he could buy filters 50% cheaper (R. 729). As to brake fluids he compared a $14, five-gallon box compared to the $17 box required by Tidewater (R. 729). As to radiator hoses, he testified he could buy them 40-50 cents cheaper, and testified as to the same as to fan belts (R. 732). He testified that he could buy rubber lubes at $1.50 as against Tidewater's $2.15 (R. 732). Mr. Lessig testified that he could obtain tires cheaper from Harry Dietz.

another dealer, than he could get them from the Tidewater warehouse (R. 664).

The testimony of plaintiff's expert witnesses showed that plaintiff suffered substantial loss of income following the termination of the lease. The total loss of income comparing the 30 months period that the dealer agreement could have run with his prior earnings as a Tidewater dealer, was $4,152.20. See Pl's Exs. Nos. 104 and 105.

A professor of accounting rendered testimony, although his prepared exhibits were excluded from the jury's consideration (Pl's Exs. 107 to 112 for Identification, R. 874-884), that the value of plaintiff's dealer contract as of May 15, 1958 was $8,529.90 (R. 863-864); that the increased gallonage at the service station involved, rising from 9,000 gallons in 1955 to 15,000 gallons in 1958, produced a going concern value capable of capitalization (R. 880), and that such value would be $6,732 (Id.).

E. The Trial

The trial was commenced on February 27, 1962, before a jury and the Honorable Lloyd H. Burke. Evidence was taken March 7, 1962. The plaintiff rested his case on said date at approximately 4:00 p.m. (R. 900) and the defendant rested at the same time without presenting a defense. Following the closing of the plaintiff's and the defendant's case on March 7, an instruction conference was held, R. 902, et seq. Closing arguments were heard on Thursday, March 8, 1962. The jury was then recessed on Thursday, March 8, until Monday, March 12, 1962 (R. 962, 986). The

jury retired following the instructions from the court-room at 12:05 p.m. and at 3:15 returned a general verdict for the defendant. Between the hours of 12:00 and 3:00 the jury had their lunch (R. 1047-1048). Following the return of the verdict the court stated:

> "Ladies and Gentlemen, not that it makes much difference one way or the other, but your verdict is quite consistent with my own views of the case as I followed the course of the trial."

Basis of the record regarding the instructions. Prior to the trial, on January 19, 1961, plaintiff filed his proposed instructions to the Jury (see Docket Entry). As originally submitted, the instructions of the plaintiff were numbered 1 through 17. The defendant had filed their instructions on February 1, 1962. At the close of plaintiff's case on Wednesday, March 7, 1962, a settlement conference was held, R. 902, et seq. The instruction conference was conducted with the understanding that each side objected to all of the instructions proposed by the other side (R. 916). Following this instruction settlement conference, plaintiff filed additional instructions numbered as follows: 7A, 7B, 7C, 8A, 8C, 8D, 8E, 11A, 18, 19, 20, 21. The defendant also filed revised instructions during the trial and said instructions were before the court during the settlement conference. The additional instructions proposed by the defendant were Revised Instruction No. 23, 24A, 28A, 28B, 28C, 28D, 37A, 52A and 52B. After the instructions were given the parties then stated objections to the instructions starting at R. 1025.

F. Rulings of the Trial Court During the Trial

(a) The court failed to instruct the jury that a manufacturer or distributor could not fix its resellers prices by compulsion or agreement. It can only announce to the trade its retail price policy and refuse to sell supplies to those it desires under *Colgate* (Rejection of Pl's Instructions Nos. 7,8, Tr. 166-170, R. 1040-1041).

(b) The court's comments in front of the jury, and its instructions, took away the issue of the plan of Tidewater to utilize dealer aid as a means of controlling prices. The trial court constantly commented on the "good faith" or ability of an oil company under the profit motive to aid its retailers in distress. But the issue was whether or not Tidewater was utilizing dealer aid to control prices after title had passed (R. 56-59; 75-76; 184-185; 204-205, Instructions, pp. 1014-1015, as to the profit motive see R. 326, 399-400; 270-275; 807-808; 835-836).

(c) The court failed to give instructions that the retail price agreements required by Tidewater from the dealers could be proved from all the facts and circumstances surrounding the conduct of Tidewater with its dealers, and that the means utilized by Tidewater could be used by the jury to determine the existence of such illicit price agreements (Rejection of Pl's Instruction No. 8(a), Tr. 170, R. 1040-1041).

(d) The court's comments in front of the jury and its instructions immunized the very means used by Tidewater to require the dealers to agree to purchase

their tires, batteries and automotive accessories from Tidewater. But these means have been the subject of specific condemnation as obvious tactics designed to coerce judgments. The jury was never told that the exclusive agreements to buy TBA's from Tidewater were oral agreements imposed by Tidewater and could be found from all the circumstances and facts attending the issue (R. 1018, 1033-1034; R. 1015-1017; 1038-1039; R. 1019, 1039; R. 1017-1018, R. 1035).

(e) The court failed to apply the principle that a powerful oil company may not attempt to monopolize by gaining control of the retail businesses and judgments of thousands of dealers, pursuant to a plan to control retail prices and purchases and control of the market thereby, under Section 2 of the Sherman Act, and withdrew plaintiff's Section 2 case from the jury (R. 447-460; R. 1008; R. 1019-1020; R. 1042, 1035).

(f) The trial court failed to instruct the jury that it could award damages to the plaintiff based upon an illegal lease cancellation pursuant to a program to control resale prices. The crux of the case was not presented to the jury in the instructions, but, rather, the court limited damages to the loss of profits made while plaintiff was on the premises (R. 1021).

(g) The court failed to properly tell the jury that if they found that the written dealer agreements of Tidewater required dealers to buy virtually their entire petroleum and oil products from it, they should find Tidewater violated the anti-trust laws (R. 1019-1020).

G. The Rulings of the Appellate Court.

The learned appellate court, over the dissent of Judge Madden, ruled that the failure of the district court to render an instruction that a plaintiff whose lease and product agreements have been canceled pursuant to conduct in violation of the antitrust laws is entitled to be awarded damages, constituted reversible error (Petr. Op. Br., Appendix II, pp. 6-7).

The court then considered other alleged errors in the instructions and exclusion of evidence, since a new trial would be had. Many of the instructions were held erroneous. Such rulings were based on the failure of the court to correctly apply the law to the facts, or its failure to render instructions based upon the evidence. The appellate court also ruled that prejudicial error had been committed when the trial court withdrew plaintiff's Section 2 case, an attempt to monopolize action from the jury (Id., at pp. 22-24).

ARGUMENT

I. THE DECISION BELOW IS IN FULL ACCORD WITH SECTION 2 OF THE SHERMAN ACT, AND THIS COURT'S RULINGS.

A. An attempt to monopolize, in violation of Section 2 of the Sherman Act, occurs when a party acts with the specific intent to monopolize some appreciable part of interstate commerce.

1. The Sherman Act is aimed, in part, at tendencies to monopolize and intentions to destroy competition.

Section 2 of the Sherman Act makes it a separate offense to "attempt to monopolize" any part of the trade or commerce among the several states. This

Court has held that a violation of the "attempt to monopolize" section may be shown by evidence proving a "specific intent to destroy competition or build monopoly". *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953). See also *Swift & Co. v. United States*, 196 U.S. 375 (1904). The Act is concerned with contracts, combinations, intentions and predatory acts committed pursuant to such intentions which "tend to create a monopoly", whether the tendency is a creeping one or one that proceeds at full gallop. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213-214 (1959). *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

The devising of ways and means for fixing prices on thousands of dealers through a compliance system has always been held to constitute evidence of an intent to monopolize. *United States v. Eastman Kodak Co.* (D.C. N.Y. 1915), 226 Fed. 62, 77-78; *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. General Motors Corp.* (7th Cir., 1941) 121 F.2d 376 at 402; *American Tobacco Co. v. United States* (6th Cir., 1944) 147 F.2d 93 at 113; affirmed on other grounds, 328 U.S. 781 (1946). The controlling of the purchases of thousands of dealers also constitutes clear evidence of the intention to monopolize. *United States v. Yellow Cab Co.*, 332 U.S. 218. In *Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949), this Court held that a major petroleum company, which controlled purchases of gasolines, oils and tires, batteries and automotive accessories by exclusive requirement contracts was in

violation of Section 3 of the Clayton Act. The effect of such means was held to "substantially lessen competition or tend to create a monopoly" in such commerce. See also *United States v. Richfield Oil Co.*, 343 U.S. 922 (1952), affirming, per curiam, 99 F.Supp. 280; *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

This Court has held that in a proceeding under the "monopolization" provisions of Section 2 of the Sherman Act, the defendant could interpose an affirmative defense of showing that he did not have the power to control prices or exclude competition from the "relevant market" as a matter of fact. *United States v. du Pont & Co.*, 351 U.S. 377 (1956). But the case involved only "monopolization" and decided that the rule of reason allowed a factual defense to show the lack of power to control prices or exclude competition absent evidence showing wrongful purpose. But when the facts proved prima facie that the party had engaged in a per se restraint of trade, such as conspiracy to monopolize, or the utilization of predatory means to control and dominate free judgments as to prices and purchases, the defense is not available. The facts here proved Tidewater had a specific intent to monopolize an appreciable segment of interstate commerce in petroleum and automotive accessories and engaged in conduct which made it impossible for others to engage in fair competition in such commerce. 351 U.S. 377, 390, 395, n. 23.

Thus petitioner's first question incorrectly states that "relevant market" is essential to a charge of

monopolization under Section 2. This Court has held only that a defendant may interpose a defense to show that, absent any violations of other sections of the Sherman or Clayton Acts, it did not have the power to control prices or exclude others from the "relevant market".

Thus the legal basis of petitioner's questions herein then are incorrect. The "relevant market" is only an affirmative defense to a monopolization case not involving the utilization of predatory weapons of coercion. It is further noted that the question presented in this section was not seriously considered by the petitioner below. (See defendant's Statement of Issues, Tr. 39-41.) Instead, the defendant sought to defend on the plaintiff's failure of proof. But the petitioner is close to a billion dollar petroleum corporation which intended to fix the prices at which 2,700 independent service station operators resold gasoline, and intended to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of these operators by coercive control. Clearly, the utilization of the various methods of price control showed a plan and program was afoot to destroy competition and exclude others. The petitioner made clear its plans to control purchases of petroleum products and TBA by predatory means. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-226 (1947). See also *Continental Ore Co. v. Union Carbide and Carbon Corp., et al.*, 370 U.S. 690 at 709 (1962).

II. THE RENDERING OF ERRONEOUS JURY INSTRUCTIONS CONSTITUTES REVERSIBLE ERROR.

The petitioner urges a review of the appellate court's rulings as to the instructions, not on the ground that the decision was incorrect, but that the decision imperils the operation of the jury system. Petitioner is not concerned that errors appeared in the instructions of the trial court, but that the appellate court was "microscopic" in its analysis; that it was concerned with mere form. But the decision rested on the trial court's failure to instruct the jury on the heart of the case: the lease cancellation as a weapon to control plaintiff's pricing policies. The omissions in the trial court's instruction were also in conflict with the basic principle that an unlawful agreement or conspiracy may be proved by the jury's considering all of the evidence; that lawful acts may lose their lawful character if part of a program or plan to violate the antitrust laws. Thus the very essence of a plaintiff's case on violation was also withheld from the jury. But the rendering of erroneous instructions or the failure to render instructions warranted by the evidence constitute reversible error. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1960); *Continental Ore Corporation v. Union Carbide Corp., et al.*, 370 U.S. 690 (1962).

III. THIS COURT HAS HERETOFORE CLEARLY HELD THAT A SUPPLIER IS LIABLE TO A DEALER FOR THE CANCELLATION OF HIS BUSINESS ARRANGEMENTS, AND THE DESTRUCTION OF HIS BUSINESS PURSUANT TO A PLAN TO CONTROL PRICES OR CONTROL TRADE AND COMMERCE.

The petitioner seeks to have a rehearing of the case of *Simpson v. Union Oil Company*, 376 U.S. (No. 87 Oct. Term 1963) through another dealer's litigation. This Court there held (petition for a rehearing denied) that a petroleum marketer was liable to its dealers for cancelling agreements or refusing to renew leases as part of an unlawful price control program or plan. *Eastman Kodak Co. v. Southern Photo. Materials Co.*, 273 U.S. 359 (1927); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); *Kiefer Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Silver v. New York Stock Exchange*, 373 U.S. 1246 (1963); *Osborn v. Sinclair Refining Co.*, (4th Cir., 1960) 286 F.2d 832.

CONCLUSION

It is respectfully urged that the petitioner has urged no ground supporting a review by this Honorable Court, and that the writ of certiorari should be denied.

Dated, San Francisco, California,
June 1, 1964.

Respectfully submitted,
MAXWELL KEITH,
Attorney for Respondent.